U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

B-6

U.S. Citizenship and Immigration Services

[redacted]

JUL 22 2004

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as an skilled worker. The petitioner is a restaurant.[1] It seeks to employ the beneficiary permanently in the United States as a Filipino food cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner submits additional information relating to two other companies and maintains that their respective financial data should also be considered in the determining the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor, (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) also provides in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

Eligibility in this case is based upon the petitioner's ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is November 1, 1999. The beneficiary's salary as stated on the labor certification is $11.55 per hour, which equals $24,024 annually, based on a 40-hour week. The visa petition indicates that the petitioner was established in 1997 and has four employees. The record reflects that it is organized as a corporation.

As evidence of its ability to pay in this case, the petitioner initially submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 1999 and 2000, which were each labeled as an extension to file the tax return. The petitioner also provided a copy of the petitioner's state quarterly wage reports, as well as a copy of the petitioner's state seller's permit. The quarterly wage reports show that the petitioner paid wages to five employees during the quarters ending June 30, 2001 through March 31, 2002. The beneficiary is not included

[1] The petitioner described its business activity as a "chain of restaurants" on the ETA-750A.

among these employees.

On January 13, 2003, the director requested the petitioner to provide date-stamped Internal Revenue printouts showing the petitioner's tax return data from 1999 to the present.

In response, the petitioner, through counsel, provided copies of the petitioner's corporate tax returns (Form 1120S) for 1999, 2000 and 2001. They show that the petitioner files its taxes using a standard calendar year. Besides net income, the petitioner's corporate tax returns show the petitioner's current assets and current liabilities on Schedule L. The difference between current assets and current liabilities is the value of the petitioner's net current assets at the end of the tax year. CIS will consider net current assets as well as a petitioner's net income because it reflects a petitioner's liquidity as of the date of filing. It represents the cash or cash equivalent assets that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. The tax returns contain the following information pertinent to the petitioner's net income and net current assets for each of those years.

	1999	2000	2001
Net Income	$ 2,961	$6,520	$21,631
Current Assets	$20,943	$1,037	$24,636
Current Liabilities	$12,027	$7,317	$11,212
Net Current Assets	$ 8,916	-$6,280	$13,424

The director denied the petition on March 18, 2003, concluding that the petitioner had failed to establish its continuing ability to pay the beneficiary's proffered annual salary of $24,024 per year.

On appeal, the counsel submits copies of the 1999 - 2002 corporate federal tax returns of [redacted] two other food/eating establishments, whose tax returns indicate that they share the same two shareholders as the petitioner. Counsel cites no legal authority, but asserts that their financial resources should also be considered in evaluating the petitioner's ability to pay the beneficiary's proffered annual wage of $24,024 because they share a "symbiotic" relationship. In support of this theory, counsel offers copies of the Articles of Incorporation of the three companies and a letter from Salvador Wong, the President of the petitioner. [redacted] states that the three entities share one administration and "are in interdependent among each other in all areas, which include the financial aspect." Counsel also provides copies of checking account statements of Manila Good-Ha, Sa Panorama, Inc., and [redacted] in support of the petitioner's financial ability to pay the beneficiary's wage offer.

Counsel's assertion that these other federal tax returns and checking account statements should be considered as part of the petitioner's continuing ability to pay the proffered wage is not persuasive. In this case, the petitioner represented as the prospective U.S. employer on the approved labor certification and on the Immigrant Petition for Alien Worker (I-140) is "Manila [redacted] and not one of these other corporate entities. As the prospective U.S. employer, the petitioner bears the burden to show its ability to pay the proffered wage. Neither the statutory nor regulatory provisions relevant to employment based immigrant petitions provide for multiple or co-employers. The regulation at 20 C.F.R. § 656.3 further identifies an "employer" in relevant part as follows:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment,

> and which proposes to employ full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. (Original emphasis).

In *Matter of Smith*, 12 I&N Dec. 772, 773 (Dist. Dir. 1968) it was found that since the petitioner was providing benefits; directly paying the beneficiary's salary; making contributions to the employee's social security, workmen's compensation, and unemployment insurance programs; withholding federal and state income taxes; and providing paid vacation and group insurance, it was the actual employer of the beneficiary. In this case, the only available documentary evidence relating to payment of wages consists of the state quarterly wage reports. The beneficiary is not listed as an employee on these reports, but they were issued in the petitioner's individual name and do not reference any other entity. The record contains no other convincing evidence that the prospective employer is any entity other than the petitioner. A contrary finding would bring into question the validity of the representations identifying the petitioner appearing on the labor certification and I-140.

As neither [redacted] can be considered as the beneficiary's actual employer, their financial documentation submitted on appeal will not be considered. Notwithstanding [redacted] statement that the entities are "financially interdependent," it is noted that the petitioner has presented no corporate or contractual proof that they bear an obligation to pay the beneficiary. The one-page Articles of Incorporation for each of the corporations, submitted on appeal, only demonstrate that the companies share the same incorporator and agent for service of process. They, in no way, show that the corporations are jointly liable for the employees' wages or any other obligation. As the court in *Sitar v. Ashcroft,* 2003 WL 22203713 (D. Mass) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The record clearly indicates that the petitioner, [redacted] are three separate corporations, with separate bank accounts, separate employer identification numbers, reporting separate incomes with separate tax obligations. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of M,* 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.,* 17 I&N Dec. 530 (Comm. 1980).

It is further noted that in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava,* 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman,* 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh,* 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983).

Counsel provided a copy of the petitioner's 2002 corporate tax return (Form 1120S) on appeal. It shows that the petitioner had -$10,362 in net income in 2002. It reported $16,323 in current assets and $6,325 in current liabilities, resulting in $9,998 in net current assets. The beneficiary's wage offer of $24,024 could not be paid out of either the petitioner's net income or its net current assets. The same must be stated as to each of the other

years from 1999 to 2001. As set forth above, none of the petitioner's federal tax returns showed that it had either sufficient net income or net current assets to cover the proffered wage. As discussed above, CIS will not consider the federal tax returns of other corporate entities in evaluating a corporate petitioner's ability to pay the proffered wage.

Counsel also provides copies of the petitioner's bank account statements from November 1999 through February 2003. To the extent that they cover the same reporting period as that of the petitioner's corporate tax returns, there is no proof that they somehow represent additional funds beyond those reported in the tax returns. Moreover, a bank account statement reflects only a partial picture of a petitioner's financial status on a particular date. It does not reflect other encumbrances and does not represent a sustainable source out of which the proffered wage must be paid.

Finally, counsel asserts that the petitioner plans to continue in business and "has been making a living for itself and for all its other employees." Counsel also claims that the employment of the beneficiary is vital to the petitioner. This seems somewhat contradictory if the petitioner has had no problems heretofore in making a living for itself. It is also noted that wages already paid to others are generally not available to prove the continuing ability to pay the proffered salary to the beneficiary as of the priority date. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner submit either its federal tax returns, audited financial statements, or annual reports as evidence of its ability to pay a beneficiary's proposed wage offer. Generalized assertions as to the viability of a particular petitioner or the ability of a beneficiary to increase business are not persuasive if not supported by the convincing evidence contained in the record.[2]

Following a review of the tax returns and other evidence contained in the record, and after consideration of counsel's assertions and evidence presented on appeal, the AAO concludes that the petitioner has not persuasively demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

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[2] It is noted that the petitioner makes no claim, and submits no evidence, that it has already employed the beneficiary, yet a biographical questionnaire, Form G-328, signed by the beneficiary in 2002 and submitted in support of his application to adjust status, states that he has worked for the beneficiary since February 1999. Form ETA 750-B, signed by the beneficiary in October 1999, however, states that he was unemployed from March 1998 until the present.